SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 340

LEE F. WEILER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF PETITIONER

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Opinion Below

No opinion was written by the District Court. The opinion of the Circuit Court of Appeals for the Third Circuit appears in the record at page 190. The concurring opinion appears at page 200. The dissenting opinion appears at page 201. None of the foregoing opinions has yet been reported in the official reports.

The opinions of the court below, however, have been printed in the Advance Reports identified as 143 F. (2d) p. 204.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, U. S. C., Title 28, Sec. 347).

The judgment of the United States Circuit Court of Appeals for the Third Circuit to be reviewed was entered on May 31, 1944 (R. 204); opinion amended and rehearing denied July 10, 1944 (R. 225).

Statement of the Case

The petitioner, Weiler, was indicted for perjury and tried in the District Court for the Eastern District of Pennsylvania.

The indictment for perjury was based upon testimony of Weiler in a trial wherein he and one Evans were indicted for

> A. Unlawfully concealing facts in a matter within the jurisdiction of the United States or an agency thereof, and
>
> B. Conspiring to defraud the United States, to wit, making false representation in a matter within the jurisdiction of the United States or an agency thereof (R. 105-114).

There were four counts in the indictment in the earlier case. At the trial of the cause before His Honor, Harry E. Kalodner, Judge of the District Court, a verdict of not guilty was directed (R. 13) as to Counts III and IV. Count I charged the defendants with falsifying, concealing and covering up by a trick, etc., to wit, by a false and fraudulent sales invoice, a material fact in a transaction involving the sale of new rubber tires and tubes (R. 107-8). Count II charged the defendants with conspiring to defraud the United States by concealing and transferring new rubber tires and tubes in contravention of a regulation of the Office of Price Administration (R. 109).

Paragraphs 10 and 11 of Count II charged that it was a part of the conspiracy that defendants would not file an inventory of new rubber tires and tubes as of December

12, 1941, required to be filed on Form PD 216 on or before December 31, 1941; and on or before December 31, 1941, the defendants knowingly and wilfully failed to file such inventory (R. 110-11).

The jury acquitted the defendants on Counts I and II and they were accordingly adjudged not guilty (R. 13).

In this earlier case, hereinafter sometimes referred to as the "OPA case", Weiler took the witness stand in his own defense, and the present perjury case arose out of testimony given by him on cross-examination in connection with the nonfiling of Form PD 216 referred to in Count II above. As to the specific matter charged in Count II of the indictment in the OPA case, viz., the wilful failure to file Form PD 216 on or before December 31, 1941, showing an inventory of new rubber tires and tubes as of December 12, 1941: Weiler satisfactorily explained that he did not receive Form PD 216 until January 5, 1942 (subsequent to the filing date), and that he did not therefore file it (R. 121). As stated above, the petitioner was acquitted of this charge. However, Judge Kalodner, while inquiring into this matter, during the Government's cross-examination of Weiler, brought out that a report on Form PD 216 had to be filed every three months (R. 121). In reply to a direct question by Judge Kalodner, the petitioner stated that he did not file a report on Form PD 216 for the first three months of 1942[1] because "* * * that was in March and I had no tires then" (R. 122). It was this question of Judge Kalodner's that was the springboard of the present perjury case.

Weiler testified upon further cross-examination that he did not buy tires in March, 1942 (R. 122), but that he had participated in a tire transaction in March, 1942, with United Petroleum Co., wherein he appeared to be the pur-

[1] This matter was subsequent to the date of any offense charged in the indictment.

chaser; but he explained that he had been the nominal purchaser only; that he had not bought the tires for himself; that payment for the tires simply represented a loan to one Roatche, and that he, Weiler, had never received the tires, and had not purchased them for his own use; and that in saying that he had not puchased the tires, he said so because his notion of a purchaser was that of one who paid for and received the tires (R. 123-46 passim).

In the course of the cross-examination, Weiler testified more particularly that United Petroleum Co. had certain new tires in its possession which its tire manager, Bernard E. Sweeney, wanted to sell. Roatche wanted to acquire these tires and Weiler was asked to finance and be the middleman in the transaction (R. 126-128, 131). Sweeney and Roatche had done business together before and were very friendly (R. 141-142). Weiler, as a distributor, had a right under the rationing program to buy tires from United, but Roatche, as a dealer, could not buy them at the same price (R. 143). The petitioner agreed to be the nominal purchaser (e. g. R. 126, 127, 129). The petitioner loaned Roatche the necessary money (R. 131, 132 and 134); he had financed Roatche in other instances (R. 135, 140). This was all done, and Roatche repaid the money to the petitioner (R. 131).

Following acquittal in the OPA case, the petitioner was indicted for perjury in May, 1943. The indictment charged Weiler with having testified falsely under oath in that in the OPA case he testified to certain material matters which he did not believe to be true, and which he knew to be false. In particularly setting forth the false oath, the indictment went on to quote excerpts from the testimony described above. The excerpts included not only the Weiler assertion that he had not bought tires in March, 1942, but also his subsequent explanations, qualifications and statements that although he appeared as a purchaser in the United

Petroleum transaction, he nevertheless was not the real purchaser; that he had signed the order for the tires in question for the accommodation of Roatche, to whom he in effect advanced the purchase price of the tires as a loan, which loan was repaid to him by Roatche (R. 3-11). The indictment alleged that in so testifying Weiler knew the truth to be that he had purchased the tires in March, 1942, from United Petroleum; that he had accepted delivery of the tires; that he had paid for them; that he had not loaned the money for the purchase of the tires, and that he had not acted as an accommodation party in the transaction (R. 10-11).

At the trial of the perjury case the Government's evidence boiled down to this:

(a) Representatives of the United Petroleum testified that Weiler had purchased the tires from the Company (R. 41-45) and eight days later at the request of United Petroleum had written a letter so stating (R. 27, 147), so that United could show OPA that a competent person had purchased the tires (R. 28).

(b) Sweeney of United Petroleum testified that at Paulsboro, N. J., United Petroleum delivered the tires to Evans, employee of Weiler, who loaded them upon a truck which Sweeney had previously seen in and around Weiler's public garage (R. 41-45).

(c) Roatche testified that he was not involved in the tire transaction, and that Weiler did not loan him the money for it (R. 59-61), although admitting that he was with Evans when United delivered the tires to Evans (R. 61) and helped load the tires on the truck (R. 62); he went along because he had nothing else to do (R. 62).

For the defense Weiler repeated the story he had told in the OPA case (R. 73-91).

At the conclusion of the trial, defendant's counsel in writing requested the court to charge as follows:

> "(8) The Government must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances. Unless that has been done, you must find defendant not guilty" (R. 103).

The request was denied (R. 100) and not in any way covered or adverted to in the charge.

The jury brought in a verdict of guilty.

Motions in arrest of judgment (R. 166) and for a new trial (R. 151) were denied, and Weiler was sentenced to jail for a year and a day (R. 167). Weiler appealed to the Circuit Court of Appeals (R. 186), which affirmed (R. 204).

In affirming, Maris, J., who wrote the majority opinion, held that refusal of the trial judge to instruct the jury on the two-witness rule in perjury cases was not error; and further *that not only was it unnecessary so to instruct the jury, but that the instruction "would impede rather than aid them in reaching a right decision"*; that in effect a defendant was not entitled to such instruction under *any* circumstances, and that the requirements of justice would better be met by withholding rather than stating such instruction (R. 195-6).

Bard, J., in a concurring opinion (R. 200), based his concurrence principally on the opinion of the United States Supreme Court in the case of *Goins* v. *United States*, 306 U. S. 622, 59 S. Ct. 783, 83 L. Ed. 1027, *interpreting that decision to mean that under no circumstances was such a refusal to instruct* (upon the two-witness rule in perjury cases) *reversible error.*

Neither the majority nor the concurring opinion held the alleged error harmless or nonprejudicial.

Jones, J., dissenting (R. 201), furnished an analysis of the legal problem involved, and concluded that the refusal to grant the instruction requested was reversible error. In the last paragraph of his opinion, he pointed out the error was prejudicial, unlike the *Goins* case (R. 203-4).

Upon petition for certiorari, this court granted certiorari upon only the first of the questions stated to be involved (appellant's Petition for Writ of Certiorari p. 8). The said question involved reads as follows:

Is a defendant indicted for perjury *never* entitled upon request to have the trial court instruct the jury upon the so-called two-witness rule in perjury cases?

Assignments of Error

The Circuit Court of Appeals for the Third Circuit erred

1. In affirming the judgment of the District Court.

2. In holding that under no circumstances is a trial judge required upon request to instruct the jury as to the two-witness rule in perjury cases.

3. In holding that the Trial Judge in the case at bar did not commit reversible error in refusing, upon request, to instruct the jury upon the two-witness rule in perjury cases.

Specification of Such of the Assigned Errors As Are Intended to Be Urged

The petitioner intends to urge the following of the assigned errors:

The Circuit Court of Appeals for the Third Circuit erred

1. In affirming the judgment of the District Court.

2. In holding that under no circumstances is a trial judge required upon request to instruct the jury as to the two-witness rule in perjury cases.

3. In holding that the Trial Judge in the case at bar did not commit reversible error in refusing, upon request, to instruct the jury upon the two-witness rule in perjury cases.

Summary of Argument

1. It is reversible error for a trial judge to refuse a requested instruction to the jury upon the two-witness rule in perjury cases, except in cases where the refusal is harmless.

2. Since the two-witness rule is part of the applicable law in perjury cases, and since it is the duty of the court to instruct the jury as to the law of the case: it would appear that juries should be instructed on the two-witness rule, whether requested or not.

3. If the rule be rigorized by the requirement that the witnesses therein enumerated must be *credible*, then the inevitable consequence is that the jury must be instructed upon the rule.

4. The error in refusing to charge was prejudicial and harmful to the accused.

Foreword

This argument does not involve the nature or validity of the two-witness rule in perjury cases. The argument is restricted narrowly to the proposition that it is the duty of a trial judge to instruct the jury, *when so requested*, upon the so-called two-witness rule in perjury cases.

The rule has been formulated by this Court in *Hammer v. United States*, 271 U. S. 620, 626, 46 S. Ct. 603, 70 L. Ed. 1118, 1120, as follows:

> "The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury."

ARGUMENT

It Is Reversible Error for a Trial Judge to Refuse a Requested Instruction to the Jury Upon the Two-Witness Rule in Perjury Cases, Except in Cases Where the Refusal Is Harmless.

This portion of the argument is made upon the hypothesis that the refusal of the Trial Judge to charge as requested, if error, was *not* harmless error. That the error *was* harmful and prejudicial will be argued later in this brief: but the present portion of the argument can be crystalized better, and brought into better focus, if the prejudicial nature of the error is assumed at the outset.

This is so because the court below predicated its opinion upholding the conviction, upon the basis that *never under any circumstances* is a court required to inform the jury in its charge, whether requested or not, of the requirements of the two-witness rule in perjury cases.

The learned court below said in its opinion (R. 194):

> "We, therefore, must begin with the premise that in the federal courts no defendant may ordinarily be convicted upon a charge of perjury which is supported by the testimony of but a single witness. *It does not necessarily follow, however, that a defendant in a perjury case is entitled to have the jury instructed as to this rule of evidence. On the contrary not only historical considerations but practical considerations as well lead to the conclusion that the jury have no role to perform in its application.* * * *" (Italics supplied)

and again (R. 195):

> "When we turn to a consideration of the rule in its practical operation we likewise reach the conclusion that it should be considered as purely quantitative in nature and as *raising no question for the jury.* Considered from the standpoint of the jury's task the in-

> terjection of the rule into their deliberations *would impede rather than aid them* in reaching a right decision upon the sole issue with which they are concerned, the guilt or innocence of the defendant. * * *" (Italics supplied).

and further (R. 198):

> "Our consideration of the subject convinces us that the question whether the government has offered sufficient proof to meet the rule as to the quantum of proof required in a perjury case is and should be treated by the trial judge as *purely a rule of law to be applied by him* in determining whether the case should be submitted to the jury or a verdict of not guilty directed." (Italics supplied).

The court below, as is evident from the above excerpts from its opinion, boldly struck out upon a hitherto untrod path in the realm of the procedural application of the two-witness rule in perjury cases. A search by counsel has failed to reveal a single case where so revolutionary a departure has been upheld by any appellate court.

It is to be observed that the majority of the court below adhered to the principle thus enunciated, without any regard to the question whether failure to charge as requested was harmful or prejudicial to the accused.

Indeed Bard, J., came to the conclusion (erroneously we submit) that your Honorable Court's affirmance in the case of *Goins* v. *United States*, 306 U. S. 622, carried the implication that even where the failure to charge as requested was "highly prejudicial" to the defendant, no error has been committed: this, despite the language in the said affirmance, which was based specifically upon the proposition that the trial judge's failure to instruct upon the two-witness rule as requested "could not have prejudiced the petitioner (defendant) * * *."

An unbroken line of decisions by appellate courts in this country holds entirely otherwise.

The latest expression we have found in a state court is in the case of *State* v. *Hill*, 223 N. C. 711, 28 S. E. (2d) 100 (1943).

The court said at p. 102-103 of 28 S. E. (2d):

> "The defendant was convicted of perjury. His appeal challenges the sufficiency of the charge as an explanation of the law relating to that crime and its application to the facts. C.S. Sect. 564. In view of the nature of the crime and the restrictions which are thrown around the evidence which must be adduced to procure conviction, we are of the opinion that the objection is well taken. We do not find, on an inspection of the instructions, that the jury was advised that the defendant could not be convicted except upon the testimony of at least two credible witnesses or one such witness and corroborative circumstances."

and again at p. 104:

> "In this case, of course, we have no opinion as to the defendant's guilt or innocence. We have merely illustrated the application of the law. It is not necessary for the trial court, figuratively speaking, to throw the book at the jury; but a substantial explanation of the law as applied to the evidence is required, and we cannot regard a clear statement of the conditions on which the defendant may be convicted as a matter of subordinate elaboration. Nor can we hold that its inadvertent omission by the able and impartial judge who tried this case as cured by the fact that, numerically speaking, two witnesses were arrayed against the defendant. That belongs to the mechanics, not to the philosophy, of the law."

The following is from *Walker, et al.*, v. *Commonwealth*, 1[illegible] S. W. 109, 116 Ky. 111, 112 (1915):

> "Without discussing all the grounds urged for a new trial and now relied on for a reversal, it is sufficient to

say that the complaint that the circuit court failed to properly instruct the jury as to all the law of the case must be sustained. In other words, the trial court did not instruct the jury, as it should have done, that before they could convict either of the defendants in this case their guilt must be established beyond a reasonable doubt by the testimony of two witnesses, or of one witness and strong corroborating circumstances. This omission will compel the reversal of the judgment. As said in Goslin v. Commonwealth, 121 Ky. 698, 90 S. W. 223, 28 Ky. Law Rp. 683:

"This is an old rule of evidence, and therefore a rule of law, applicable to the rights of persons as well as to the rights of property. It is not merely a technical rule, but one of substantial justice, and founded upon a safe and wise public policy. Not only would it be unsafe, as it is sometimes said of it, that one man's oath in such matter should outweigh another's, which is possibly not entirely satisfactory, in view of the fact that it may do so in respect to property, or even life; but it is a matter of first importance in the administration of justice that witnesses should feel themselves safe in testifying to their own conception, recollection, and honest belief as to the facts forming the subject of inquiry in the courts. If it were so that one man could be convicted of perjury or false swearing by the oath alone of another who testifies to the contrary, the timid and the humble and obscure would not feel safe, and would not be safe, in giving their testimony, where it might be opposed by that of one of influence and prominence. It is right that the jury, or other tribunal trying the fact, should have the privilege of weighing the evidence, of discrediting one witness entirely, and believing another, according to the probability of the matter as it seems to them; but, if the law allowed that one man's oath might convict another of perjury or false swearing, the effect would be to deter the timid and obscure person, and to that extent retard the administration of pure justice. It would deprive the court or jury in many instances of a full hearing from all who might

> have knowledge as witnesses of the facts being tried. * * * This wise old rule of the common law is one which this court has always recognized and enforced. It applies alike to prosecutions for false swearing and perjury; for those offenses are alike, and the principles and policy of the law applicable to one, save wherein modified by statute, apply to the other. Commonwealth v. Davis, 92 Ky. 460, 18 S. W. 10, 13 Ky. Law Rep. 676.' "

As far back as 1889, it was held by the Court of Appeals of Texas, in *Wilson* v. *State*, 10 S. W. 749, 750; 27 Tex. Crim. R. 47, 49, that it was fundamental error to fail to give an instruction upon the two-witness rule, since under the code of criminal procedure it was imperative in felony cases that the courts "shall distinctly set forth the law applicable to the case, whether asked or not." The failure to charge was held a "fatal omission."

The court's statement in the *Texas* case that the two-witness rule is a fundamental part of the law in a charge of perjury and that, therefore, an instruction should be given whether asked or not, is worthy of note. So fundamental is the two-witness rule in perjury cases, that to say it is part of the law of the case is but to state a truism. Since as a general proposition the very function of the court's instruction to a jury is to give them the law of the case, it would appear that the Texas Court stated a profound truth in holding that the instruction should be given even without request.

The following language is from *State* v. *Rutledge*, 79 Pacific 1123, 1124; 37 Wash. 523, 528 (1905):

> "The respondent concedes the principle of law embodied in the foregoing request, but claims it was not error to refuse such request in this case for the reason that there were in fact more than one witness, and cites Montgomery v. State, 40 S. W. 805, from Texas, as sustaining this contention. The case cited does not

sustain the doctrine contended for. On the contrary, the courts of Texas have held in numerous cases that the omission to instruct the jury that a conviction of perjury cannot be had on the testimony of a single witness is reversible error."

Other cases enunciating the same principle are collected in the footnote.[2]

Text Authorities

To the same effect are the following statements from texts:

48 C. J. 909, Perjury, Sec. 184:

"The court should instruct the jury as to the degree of proof and the number and corroboration of witnesses required to support a conviction for perjury, * * * The necessity for a charge that the falsity of the oath must be proved by two witnesses or by one witness and corroborating circumstances is not obviated by the fact that more than one witness testified to the perjury, * * *"

The following is from 41 Am. Jur. 40, Perjury, sec. 72:

"The court should inform the jury of the material facts that must be established to sustain a conviction and as to the number and corroboration of witnesses required to support a conviction for perjury."

Wigmore on Evidence, Second Edition, Vol. 4, page 325, states:

"The jury should be instructed not to convict unless the testimony of the principal witness has been so cor-

[2] *Madden* v. *State*, 223 Pacific 716, 26 Okl. Crim. 251, (1924); *Clower* v. *State*, 236 S. W. 265, 151 Ark. 359 (1922); *Brown* v. *State*, 276 S. W. 929, 101 Tex. Crim R. 639 (1925); *Knight* v. *State*, 158 S. W. 543, 71 Tex. Crim. R. 36 (1913); *Saucier* v. *State*, 48 So. 840, 95 Miss. 226 (1909); *Wadlington* v. *Commonwealth*, 59 S. W. 851, 22 Ky. L. 1108 (1900); *Goslin* v. *Commonwealth*, 90 S. W. 223, 121 Ky. 698 (1906); *State* v. *Heed*, 57 Mo. 252 (1874); *Holt* v. *State*, 89 S. W. 538, 48 Tex. Crim. R. 559 (1905).

roborated that they believe it to be true beyond a reasonable doubt."

Cases Distinguished

In *O'Leary* v. *United States*, 158 Fed. 796, where the refusal to charge was held not reversible error, the case was decided in effect upon the principle that the error was harmless because the perjury had been indubitably proven by records; the real issue being apparently only one of intent or forgetfulness on the part of the accused, and not in any sense as to anything to which the corroborative proofs were related.

In *Manning* v. *State*, 127 S. E. 475, 33 Ga. App. 610 (1925), it was held that the court should have given the requested instruction on the two-witness rule, but that the conviction should not be reversed since the error was harmless.

We have cited the last two cases in order that your Honorable Court may have before it the benefit of all our search; but it is patent that those cases do not affect the principle for which the petitioner contends.

An examination of all the above listed authorities discloses an uninterrupted line of cases holding that the accused is entitled to have the jury instructed on the two-witness rule. Some cases went so far as to declare that it is reversible error to omit the instruction, whether requested or not. Another case characterized the omission as fatal.

The very number of the cases, and their uniform rationale, should be persuasive in upholding the petitioner's contention that the learned court below erred in departing from the rule to which those cases, whether recent or of more ancient vintage, have so consistently adhered.

The Authorities in the Federal Courts

Goins v. *United States*, 99 Fed. (2d) 147 (the case upon the affirmance of which Bard, J., relied for his concurring

opinion in the court below) lends support to the petitioner's contention. The court there said, pp. 148-9:

> "On the second point it may be assumed that the requested instruction embodied correctly the rule of law as applied in the federal courts, where it has been uniformly held that the uncorroborated oath of one witness is not enough to establish the falsity of the oath as to which perjury is charged, and that, except where the falsity of such oath is indisputably established, as by documentary evidence, it must be shown by the testimony of at least two witnesses, or by the testimony of a witness corroborated by circumstances proved by independent testimony. *And it may be assumed also that ordinarily the defendant is entitled to have the jury so instructed.*" (Italics supplied.)

In *Pauley* v. *United States*, 47 Fed. (2d) 1024, 1026, the 9th Circuit said, after quoting the two-witness rule from the case of *Hammer* v. *U. S.*, 271 U. S. 620, 46 S. Ct. 603, 70 L. ed. 1118:

> "In a proper case, therefore, it is the duty of the court to give an instruction embodying this principle of law, if timely requested."

And to the same effect is *Allen* v. *United States*, 194 Fed. 664, 668.

Such unanimity of opinion in courts of different jurisdictions is by no means to be found in all phases of the law. The existence of that unanimity in the phase of the law under discussion argues the existence of compelling underlying reasons: and, conversely, furnishes ground for the petitioner's position that the abrogation of the rule by the learned court below constitutes reversible error.

There is nothing esoteric or recondite in the reasons underlying the rule. We quote only part of Mr. Best's lan-

guage as it appears in Wigmore on Evidence, Second Edition, Vol. 4, page 322:

> "The foundations of this rule, we apprehend, lie much deeper. The legislator dealing with the offence of perjury has to determine the relative weight of conflicting duties. Measured merely by its religious or moral enormity, perjury, always a grievous, would in many cases be the greatest of crimes, and as such be deserving of the severest punishment which the law could inflict. But when we consider the very peculiar nature of this offence, and that every person who appears as a witness in a court of justice is liable to be accused of it by those against whom his evidence tells, who are frequently the basest and most unprincipled of mankind; and when we remember how powerless are the best rules of municipal law without the co-operation of society to enforce them—we shall see that the obligation of protecting witnesses from oppression, or annoyance, by charges, or threats of charges of having borne false testimony, is far paramount to that of giving even perjury its deserts."

We respectfully refer your Honorable Court to Wigmore for the balance of the excerpt from Best's Evidence, which is somewhat too lengthy for reproduction here.

Upon both principle and authority, therefore, it would seem that the Trial Judge's failure to charge as requested was reversible error.

The Witness Referred to in the So-called Two-Witness Rule Must Be Credible Witnesses

Another facet of the two-witness rule requires examination here.

Some of the courts apply the rule with even greater rigor. They add to the requirements adopted by all courts, the further requirement that the witnesses enumerated in the rule must be *credible* witnesses.

Before citing the authorities for this statement, it would be well to study the implication of this added requirement.

If the rule be weighted by the added requirement that the witnesses must be credible, then the conclusion at once follows that failure to instruct upon the rule is error.

For, if the rule renders indispensible not only the prescribed number of witnesses, but also the factor of credibility on the part of those witnesses: then only a jury may adjudge the witnesses credible or not: such being inherently a jury's, and not a judicial, function.

Since, in the philosophy of our legal system, the province of the trial judge is more or less sharply marked off from that of the jury: and since it would hardly be disputed that the credibility of witnesses comes within the province of the latter and not of the former: it must follow that if the jury cannot convict unless the minimum number of witnesses in a perjury case be held by them credible, then they must be informed of the rule so that their deliberations may include that factor. If, therefore, credibility be a *sine qua non*, then the error in the language of the opinion of the learned court becomes more striking—that is to say, the language to the effect that the instruction on the two-witness rule would deter the jury rather than aid them in reaching a proper verdict.

The Authorities on the Credibility Rule

Jones, J., dissenting below, stressed the importance that the witnesses be, not merely witnesses, but *credible witnesses*, in the following language (R. 202).

> "The question then is whether the rule is merely quantitative as to the number of witnesses to be produced by the prosecution or must the jury believe two witnesses or one witness and corroborating circumstances before guilt may be found. In his work on Evidence (Third Ed.) Vol. VII at Sect. 2038, Wigmore

says in discussing the proof required to support a charge of treason,—

"(3) The rule of two witnesses means, by reason of the general principle * * * that they must be effective witnesses, i. e., they must both be believed by the jury. A rule requiring a certain quantity of evidence is binding upon the jurors as well as upon the judge; they are not to convict unless in their judgment the required amount exists. If the testimony of one is rejected by the jury upon consideration, there remains but one witness,—less than the rule requires."

Nor do I think any distinction is relevantly to be drawn because the requirement as to the quantum of proof in treason cases is constitutionally prescribed. Our present concern is as to when the requirements of the two-witness rule can be said to have been met. That question can just as pertinently arise in a trial for perjury as it can in a trial for treason. The inquiry is whether the jury, in order to convict, must find the evidence credible to the extent of the quantity of proof which the law requires. I think it must. If the answer were otherwise, the rule would prove in practice to be but an empty form."

And we respectfully refer your Honorable Court to the paragraph of Judge Jones' dissenting opinion following the excerpt just quoted.

Judge Jones occupies no isolated position in his construction of the rule with regard to the requirement of credibility.

State v. *Hill*, 223 N. C. 711, 28 S. E. (2d) 100, held that the jury must be instructed that the defendant could not be convicted "except upon the testimony of at least two *credible* witnesses or one such witness and corroborative circumstances." (Italics supplied.)

Brown v. *State*, 276 S. W. 929, 931, 101 Tex. Crim. R. 639, 644 (1925), went further:

"Where the state relies on two witnesses only, and one is assailed, it has also been held error to refuse an

> instruction that, if the jury believe the party so assailed was not a credible witness, they should acquit. Kitchen v. State, 29 Tex. Crim. App. 45, 14 S. W. 392."

In *Clower* v. *State*, 236 S. W. 265, 266, 151 Ark. 359 (1922), it was also held that the witnesses in perjury cases must be *credible* witnesses; and for error in failure to give a proper requested instruction to that effect the conviction was reversed and a new trial granted.

To the same effect is *Madden* v. *State*, 223 Pacific 716; 26 Okl. Crim. 251 (1924). There a conviction was reversed because the instruction on the two-witness rule spoke only of witnesses and not of "credible witnesses."

Upon the authority of the cases cited, therefore; by reason of the analogy in the requirements of proof as between treason and perjury cases: and upon the lucid and forceful exposition in the dissenting opinion by Jones, J., below, it is respectfully urged that the trial court committed error in refusing the request to charge upon the two-witness rule.

The Error (in Refusing to Charge) was Prejudicial and Harmful to the Accused

It can hardly be questioned that the refusal of the trial judge to charge as requested, if error, was not harmless error.

Jones, J., dissenting below, said so specifically in his dissenting opinion.

Bard, J., concurring below, implied as much in his concurring opinion.

The import of the majority opinion below by Maris, J., was that the accused is not under any circumstances entitled to a charge: whence the implication follows, either that in the eyes of the law the omission to charge can never be construed as prejudicial, or that it does not matter whether the failure to charge be prejudicial or not.

That opinion states (R. 198):

> "Certainly, if the jury have any function to perform under such instructions, the performance of which might conceivably lead to the acquittal of the defendant rather than his conviction, the refusal of the instructions could hardly be said not to prejudice his rights."

Jones, J., had this to say concerning the prejudicial effect of the failure to charge:

> "Nor may the trial error, thus indicated, be overlooked as not having been prejudicial. The evidentiary situation in the instant case differed materially from that presented in the Goins case. Here, one witness testified in corroboration of the principal witness and two more testified to later admissions by the defendant. If the jury believed none but the principal witness, then their verdict rested on less than what the law requires. That they did believe more than one witness is not to be inferred from the verdict in the absence of any instruction as to the quantity of proof required for the establishment of the defendant's guilt" (R. 203).

An examination of the structure of the case, as it was presented to the jury, leads to the same conclusion as that reached by Jones, J.

Whether or not Weiler had committed perjury depended upon the question was Weiler only the nominal purchaser for Roatche's benefit, or was he the actual purchaser. This in turn depended upon the factual question whether he had loaned the money to Roatche for the purchase of the tires.

If in truth Weiler were merely financing the transaction, if he were the nominal purchaser only, if he loaned the money to Roatche and Roatche repaid him, then Weiler was not testifying falsely in stating that he did not purchase tires in March of 1942.

But the only witness for the Government in the trial of the perjury case *who testified that no loan was made* was

Roatche. On this point, the proofs boil down to oath against oath—Roatche's against Weiler's. It is to be observed that other testimony for the Government related only to the order given by Weiler for the purchase of the tires, and the delivery of the tires to Evans at Paulsboro, New Jersey—not Weiler's place of business: (R. 46, 47). Such other testimony had no probative value with regard to the point at issue, for Weiler conceded freely at the O. P. A. trial that he had given the order. This testimony could not by its nature resolve the question whether Weiler was the actual or only the nominal purchaser. Thus, the requirements of the two-witness rule were not satisfied, there being no corroboration of the point mentioned; and the error in failing to instruct on the rule was prejudicial.

Even assuming arguendo that the required quantum of proof was present in the case as presented to the jury, there is still no way of telling whether the jury believed more than one of the witnesses. No legal machinery exists for the determination of such a question

But: if the jury convicted believing the testimony of only one witness to the perjury, then the requirements of the rule have not been met, and the defendant stands improperly convicted. Here lies the vice of the refusal to instruct: had the requested charge been given the problem would not arise.

* * * * * * * *

We take the liberty of bringing the following to the attention of your Honorable Court.

In the case of *Goins* v. *United States*, 306 U. S. 622, this Court affirmed a conviction where the court had failed and refused to charge the jury upon the two-witness rule, in the following language:

> "As it appears on hearing argument that the District Court's failure to give Instruction B could not have prejudiced the petitioner, * * *".

In other words, this Court refused to reverse in the *Goins* case because the error was harmless. But Bard, J., concurring below, took the *Goins* case to mean that a court need never charge the jury upon the two-witness rule in perjury cases; because, in his (Judge Bard's view), any failure so to charge must *always* be highly prejudicial; and since this Court had said "the failure to give the requested instruction did not prejudice the defendant", it must follow that the Goins decision means that a jury need *never* be instructed upon the rule (R. 200).

It is perfectly clear from the entire tenor of Judge Bard's concurring opinion that his concurrence was based upon the *Goins* case and his construction thereof: and had it not been for such construction he in all probability would have voted to reverse the conviction. Since Jones, J., dissented below, the result would have been a reversal.

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For the reasons given, it is respectfully contended that the judgment of the lower court should be reversed and a new trial granted.

Respectfuly submitted,

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